

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

September 5, 2013 at 10:30 a.m.

1.	<u>13-91208-E-7</u>	ANGELA PUTT	MOTION TO RECONSIDER
	MDM-1	Pro Se	8-9-13 [<u>24</u>]

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) and Office of the United States Trustee on August 9, 2013. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Reconsider was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion to Reconsider. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Michael D. McGranahan, Chapter 7 Trustee, requests that the court reconsider its Order granting waiver of the filing fee on the basis that Debtor declared her net income of \$1,091.51 per month, but that her gross income is \$2,160.00 per month. Trustee states the net income is reduced by payroll withholdings, including \$652.06 for health insurance (dental, vision, and standard health) and \$170.73 for retirement.

Trustee states that without the withholdings for medical and retirement, debtor's net income is \$1,914.13, while 150% of the HHS Poverty Guidelines monthly gross income for a family of one is \$1,436.25. The Trustee argues that, although net income is used to determine eligibility, it is not the intent of the statute to allow the debtor to include any and all payroll deductions in determining net income. Health insurance and

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retirement are not mandatory withholdings, and could be included on Schedule J of monthly expenses.

DISCUSSION

Federal Rules of Civil Procedure Rule 60(b), as made applicable by Bankruptcy Rule 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

Red. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts, which if taken as true, allows the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]-[2] (3d ed. 2010); *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Civil Rule 60(b), courts consider three factors: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default" *Falk*, 739 F.2d at 463.

The court's policy is to not conduct a hearing on a fee waiver request until after the First Meeting of Creditors has been completed. The court in error scheduled the hearing on the fee waiver for August 1, 2013, which pre-dated the August 6, 2013 First Meeting of Creditors. It is critical to the judicial process that the bankruptcy trustee be afforded the opportunity to conduct the First Meeting of Creditors and test the Debtor's stated financial information for the court to conduct a meaningful review of an application for a fee waiver.

The Trustee does not dispute the accuracy of the information set forth on Schedule I (Dckt. 1 at 22) or that the Debtor computes her Average Monthly Income to be \$1,091.51. The Trustee points out that the Debtor's expenses for her PERS retirement includes a voluntary 403(b) contribution. In addition, this individual debtor with no dependants has a monthly insurance payment of \$652.06 (which is \$7,824.72 annually). The Debtor expends almost 40% of her gross income (\$822.79 just on retirement contributions and insurance). Additionally, her income will increase in July 2013 as the furlough days at her job are terminated and she will be receiving an additional 2.18% increase in pay by her employer terminating a 2.18% salary reduction which is reflected in the amounts set forth on Schedule I.

Because the First Meeting of Creditors had not been concluded, the Debtor's financial premise was not tested. The court has not been provided with the explanation as to why the Debtor's income is reduced by almost 40 percent for insurance and retirement along.

However, obtaining relief under Rule 60(b) is something more than a party wanting to re-argue the issue, present arguments which could have been presented at the prior hearing, or present evidence which could have been presented at the prior hearing. On July 8, 2013, the court sent a Notice of Hearing on the Application for a Fee Waiver. Dckt. 12. The Bankruptcy Noticing Center certificate of service on the Trustee, Debtor, and U.S. Trustee was filed on July 8, 2013. Dckt. 14. While it may well be true that the court would have decided the matter differently if these arguments and evidence were presented at the August 2, 2013, there has been no showing that the Trustee did not have notice of the hearing, grounds for excusable neglect exist for the Trustee or U.S. Trustee not filing an objection or appearing at the August 2, 2013 hearing to state an objection, or that there is newly discovered evidence which is now being presented to the court. The evidence relied upon by the Trustee is the information in the Schedules and Fee Waiver Application.

To the extent that the court made an error in granting the fee waiver, such error does not rise to the level of relief being granted under Federal Rule of Civil Procedure 60(b) and Federal Rule of Bankruptcy Procedure 9024. The Trustee does not appear to allege any grounds other than the court was in error in applying the facts of this case to the law - the net income shown on Line 16 of Schedule J was reduced due to excessive deductions. The court compounded its error by relying on the net income figure shown on the Fee Waiver Application, rather than the gross income which is not subject to manipulation. (The use of "net income" is not required for by the statute and the HHS guidelines do not specify the use of

"net income." In normal court, this court considers the application in light of the gross income.)

Based on the error asserted that the court made a mistake in applying the law to the facts, the Trustee has not show a sufficient basis under Rule 60(b) for the relief. It was not asserted that confusion occurred due to the court inadvertently setting the hearing before the First Meeting of Creditor or that the court's error created a calendaring error for the Trustee. A Rule 60(b) motion may not be used as a substitute for a appeal of the court's decision. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993).

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Reconsider filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Reconsider is denied.

2. [10-90417-E-7](#) CASEY/LAURA BOYLES
SLF-3 David S. Hagen

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF THE SUNTAG LAW
FIRM FOR DANA A. SUNTAG,
TRUSTEE'S ATTORNEY(S), FEES:
\$8,000.00, EXPENSES: \$0.00
8-8-13 [[66](#)]

DISCHARGED 5-24-10

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors's Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 8, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Final Application for Fees is granted. No appearance required.

FEES REQUESTED

The Suntag Law Firm, Counsel for the Chapter 7 Trustee, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period October 24, 2012, 2012 through September 5, 2013. The order of the court approving employment of counsel was entered on January 18, 2013.

Description of Services for Which Fees Are Requested

General Case Administration: Counsel spent 9.4 hours in this category. Counsel reviewed the Debtor's schedules to determine whether it was appropriate to object to exemptions, prepared Suntag's employment application, and prepared the instant application for compensation.

Review of Motion to Reopen: Counsel spent .9 hours in this category. Counsel reviewed and advised Mr. Farrar on the motion to reopen this case.

Compromise of Controversy: Counsel spent 37.1 hours in this category. Counsel began an investigation regarding the Debtor's class

lawsuit, contacted counsel for Plaintiffs, attempted to sell the estate's non-exempt interest in the Lawsuit; attempted settlement negotiations with the defendants, worked on a order employing special counsel, and reached a compromise for \$30,000.00. Counsel prepared the settlement agreement and a motion for court approval of the compromise.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal services, the attorney must still demonstrate that the work

performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

- (a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?
- (b) To what extent will the estate suffer if the services are not rendered?
- (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that Counsel's services rendered a successful negotiation of the estate's interest in a class lawsuit for the benefit of the Estate. The estate has \$17,000.00 to be administered as of the filing of the application. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$315.00/hour for counsel Dana Suttgart for 6.4 hours, \$295.00/hour for counsel Loris Bakken for 32.5 hours, \$250.00/hour for counsel Joshua Stevens for .3 hours, and \$195.00/hour for counsel Patrick Larsen for 4.7 hours.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$115.77 for copies (\$0.10 per page) and postage. The total costs in the amount of \$115.77 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Total fees are in the amount of \$12,910.00, but counsel seeks the reduced amount of fees and costs of \$8,000.00. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees and costs in the amount of \$8,000.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel is allowed, and the Trustee is authorized to pay, the following amounts as compensation as a professional in this case:

Attorneys' Fees and Costs	\$8,000.00
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The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that The Suntag Law Firm is allowed the following fees and expenses as a professional of the Estate:

The Suntag Law Firm, Counsel for the Chapter 7 Trustee Applicant's Fees and Costs Allowed in the amount of \$8,000.00

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

3. 13-91417-E-7 CYNTHIA ZARAGOZA MOTION TO COMPEL ABANDONMENT
JDP-1 James Pitner 8-22-13 [[11](#)]

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on August 22, 2013. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Abandon Real Property. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this

tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtor seeks an order compelling the Chapter 7 Trustee to abandon a checking account ending in 8372 and a savings account ending in 7279 with Bank of the West in Patterson, California.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

Here, the two bank accounts are fully exempted on Debtor's amended Schedule C, pursuant to California Code of Civil Procedure 703.140(b)(5). As the property is exempted, it is of inconsequential value to the estate.

Since the property is exempted and the negative financial consequences of the Estate retaining the property, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Abandon Property filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted and that the personal identified as:

1. Bank of the West checking account ending in 8372; and
2. Bank of the West savings account ending in 7279

on Schedule B by the Debtor are abandoned to the Debtor, Cynthia Jeanine Zaragoza, by this order, with no further act of the Trustee required.

4. [13-90819](#)-E-11 LEASEMOBILE OF SONORA, INC.
UST-1 David C. Johnston MOTION FOR ORDER DESIGNATING
DEBTOR A SMALL BUSINESS DEBTOR
7-26-13 [[32](#)]

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, all creditors, and parties requesting special notice on July 26, 2013. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion for Order Designating Debtor a Small Business has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Order Designating Debtor a Small Business is granted. No appearance required.

U.S. Trustee moves the court for an order designating the Debtor, Leasemobile of Sonora, Inc., a small business debtor as that term is defined by 11 U.S.C. § 101(51D) and providing that all the small business deadlines run from the date of the Debtor's petition.

U.S. Trustee states that on the Debtor's petition, Debtor checked the box to indicate that it was NOT a small business Debtor. However, U.S. Trustee argues that the Debtor corporation has historically been engaged in commercial or business activities not primarily related to the ownership or operation of real property, but has leased vehicles and other equipment to consumers and businesses. The U.S. Trustee also argues that Debtor has aggregate noncontingent liquidated secured and unsecured debts as of the date of the filing of the petition in an amount under \$2,343,300.00, actually totaling \$1,037,000.00 according to Debtor's schedules.

DISCUSSION

Federal Rule of Bankruptcy Procedure 1020(a) provides that in a voluntary chapter 11 case, the debtor shall state in the petition whether the debtor is a small business debtor. Further, the status of the case as a small business case shall be in accordance with the debtor's statement unless and until the court enters an order finding that the debtor's statement is incorrect. Fed. R. Bankr. P. 1020(a).

Federal Rule of Bankruptcy Procedure 1020(b) provides,

...the United States trustee or a party in interest may file an objection to the debtor's statement under subdivision (a) no later than 30 days after the conclusion of the meeting of creditors held under § 341(a) of the Code, or within 30 days after any amendment to the statement, whichever is later.

Here, the U.S. Trustee has objected to the debtor's statement within 30 days after the meeting of creditors, showing that Debtor meets the qualifications of a small business debtor under 11 U.S.C. § 101(51D). Debtor has not filed opposition or provided a reason why it does not qualify or wish to continue as a non-small business debtor.

Therefore, the motion is granted and the designation of Debtor shall be a small business debtor and the deadlines of a small business debtor shall run from the date of the Debtor's petition.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Order Designating Debtor a Small Business filed by The U.S. Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the Debtor is a small business debtor and all the small business deadlines run from the date of the Debtor's petition.

5. 13-90819-E-11 LEASEMOBILE OF SONORA, MOTION TO CONVERT CASE FROM
UST-2 INC. CHAPTER 11 TO CHAPTER 7
 David C. Johnston 7-26-13 [[28](#)]

Local Rule 9014-1(f) (1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, all creditors and parties requesting special notice on July 26, 2013. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Convert has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f) (1) (ii) is considered to be the equivalent of a statement of nonopposition. Cf. *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Convert is granted and the case is converted to a proceeding under Chapter 7. No appearance required.

The U.S. Trustee seeks to convert this case to one under Chapter 7 because Debtor has not filed any Monthly Operating Reports since filing this case and the debtor's deadline for filing schedules, statement of financial affairs and related documents was May 14, 2013, but the documents were not filed until June 19, 2013. The Trustee also states that the Debtor failed to appear at the first initial interview and then failed to appear at the first two scheduled sessions of the meeting of creditors, finally appearing at the third session. The Trustee states that it is possible that the underlying vehicles and equipment may contain equity for the estate and a Chapter 7 Trustee should investigate.

DISCUSSION

A Chapter 11 case may only be dismissed or converted for cause. 11 U.S.C. § 1112(b) (1). The Bankruptcy Code provides a list of causes, which are sufficient to support dismissal or conversion. *Id.* at § 1112(b) (4). Generally, such lists are viewed as illustrative rather than exhaustive; the court should "consider other factors as they arise, and use its equitable powers to reach the appropriate result in individual cases." *Pioneer Liquidating Corp. V. U.S. Trustee (In re Consol. Pioneer Mortg. Entities)*, 248 B.R. 368, 375 (B.A.P. 9th Cir. 2000) (citation omitted).

Questions of conversion or dismissal must be dealt with a thorough, two-step analysis: "[f]irst, it must be determined that there is 'cause' to act[;] [s]econd, once a determination of 'cause' has been made, a choice must be made between conversion and dismissal based on the 'best interests of the creditors and the estate.'" *Nelson v. Meyer (In re Nelson)*, 343 B.R. 671, 675 (B.A.P. 9th Cir. 2006) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 877 (B.A.P. 9th Cir. 2002)).

The Bankruptcy Code Provides:

[O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under sections 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b) (1) .

11 U.S.C. § 1112(b) (4) (F) includes as a "cause" for conversion or dismissal of a case under § 1112(b) (1) the debtor's unexcused failure to satisfy timely any filing or reporting requirement established by title 11 or by any rule applicable to a case under chapter 11. Federal Rule of Bankruptcy Procedure 2015(a) (3) requires that a debtor in possession file the reports and summaries required by § 704(8) of the Code.

Here, Debtor has failed to file the monthly operating reports for May and June 2013. The Debtor was also late in filing its schedules and other documents, failed to appear at the first initial interview, failed to appear at two sessions of the Meeting of Creditors and has failed to file any operating reports. Debtor has shown delay which is prejudicial to creditors. Therefore, the motion is granted and the case is converted to one under Chapter 7.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Convert having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Convert is granted and the case is converted to a proceeding under Chapter 7 of Title 11, United States Code.

6. [13-90835](#)-E-7 SAMUEL KRUGH
MDM-1 Richard L. Schneider

CONTINUED OPPOSITION RE:
TRUSTEE'S MOTION TO DISMISS FOR
FAILURE TO APPEAR AT SEC.
341 (A) MEETING OF CREDITORS
6-21-13 [[17](#)]

CONT. FROM 8-1-13

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Debtor's Attorney on July 11, 2013. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor having filed opposition, the court will consider the motion on the merits.

The court's tentative decision is to deny the Motion to Dismiss. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

The Chapter 7 Trustee alleges that the Debtor did not appear at the Meeting of Creditors held pursuant to 11 U.S.C. § 341. Attendance is mandatory. 11 U.S.C. § 343. Failure to appear at the Meeting of Creditors is unreasonable delay which is prejudicial to creditors and cause to dismiss the case. 11 U.S.C. § 707(a)(1).

Debtor's counsel filed a declaration, testifying that his client has been living and working in China since February of 2009 and that they have been attempting to arrange a 341 appearance for many months. Counsel states that the difficulty has been the 15 hour time difference and the Trustee did not wish to do a Skype teleconference. A teleconference using the auspices of the US Embassy in China was rejected. Counsel asserts he timely informed the Trustee of the inability to set up a conference before the last First Meeting of Creditors. Counsel states that his client will be here for the entire month of August for his daughter's wedding and they expect to attend the continued First Meeting of Creditors on August 20, 2013, if the court permits.

CONTINUANCE

Debtor having addressed the communication difficulties and the testimony of counsel that Debtor will be in the country and able to attend the continued 341 meeting on August 20, 2013, the court continued the hearing on the motion to dismiss to 10:30 a.m. on September 5, 2013.

A review of the docket shows that the Section 341 meeting was concluded on August 8, 2013, as stated in the Trustee's Report of No

Distribution. Trustee's Report of No Distribution, August 21, 2013 Docket Entry.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss the Chapter 13 case filed by the Chapter 13 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is denied.

7. [10-91946-E-7](#) **STEFANIE TEODORIU** **MOTION TO COMPROMISE**
 SLF-3 Pro Se **CONTROVERSY/APPROVE SETTLEMENT**
 AGREEMENT WITH STEFANIE
 TEODORIU
 8-5-13 [[49](#)]

DISCHARGED 9-7-10

Local Rule 9014-1(f) (1) Motion - No Opposition.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (pro se), Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 5, 2013. By the court's calculation, 31 days' notice was provided. 21 days' notice is required.

Tentative Ruling: The Motion to Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (1) and Federal Rule of Bankruptcy Procedure 2002(a) (3).

The court's tentative decision is to grant the Motion to Compromise. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Chapter 7 Trustee Gary Farrar moves for authorization to compromise the Debtor's products liability lawsuit filed June 9, 2011, that was subsequently made part of multi-district litigation entitled In re: Chantix (Varenicline) Products Liability Litigation (MLD-2092), Stefanie Marie Bush v. Pfizer, Inc.; United States District Court, Northern District of Alabama, Southern Division, Case No. 2:09-CV-2039-IPJ ("Lawsuit").

Trustee states that Defendant in the MDL has required that the terms of the proposed compromise, including the settlement amount and the

settlement documents, be and remain confidential and be disclosed only to the extent necessary as required by law. Trustee states he is authorized to disclose that he and his counsel have reviewed the Settlement Documents and that the amount of the settlement is sufficient to pay all unsecured creditors and administrative expenses in full (including all professional fees), such that there will be a surplus paid over to the Debtor. Trustee states that he will be prepared to disclose the exact terms of the Compromise to the Court in confidence and show the Court copies of the Settlement Documents for its review in confidence in camera at the hearing on the Motion (or at such other time as the Court may designate).

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;
2. Any difficulties expected in collection;
3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and
4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Here, the Trustee argues that the four factors have been met.

Probability of Success

The Trustee states the probability of success if the Lawsuit proceeded to trial is uncertain. Trustee argues that the Lawsuit alleges several causes of action, including negligence, strict products liability, and fraud, with Debtor's central assertion is that she suffered personal injuries caused by her use of Chantix. Pfizer disputes this, claiming that the side effects of Chantix are in line with other anti-smoking treatments and raises numerous defenses, including the adequacy of the heightened warning it placed on Chantix boxes before the Debtor began using Chantix. Trustee states it is difficult to predict the manner in which the case would resolve at trial because of the disputed factual issues on liability, causation, and damages. Trustee argues that the Compromise represents a guaranteed and complete success for the estate because the recovery to the estate will satisfy all scheduled debts and administrative expenses and will allow the Debtor to receive the surplus amounts.

Difficulties in Collection

Trustee state he is not aware of any difficulties that might arise if he were to obtain a judgment at trial other than the usual judgment collection issues. Trustee argues the Compromise is a reasonable settlement that allows for certainty of recovery and payment.

Expense, Inconvenience and Delay of Continued Litigation

The Trustee argues that litigation would result in significant costs, estimated at \$ 300,000 to \$ 500,000, given the unsettled area of law which is complicated law issues. The Trustee argues the compromise is in the best interest of the estate because it will result in immediate payment and satisfaction of all claims.

Paramount Interest of Creditors

The Trustee argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to creditors which could be consumed by the additional costs and administrative expenses created by further litigation.

Consideration of Additional Offers

At the hearing, the court shall announce the proposed settlement and request any other parties interested in making an offer to the Trustee for the claims or interests in the property to state their offers in open court.

Surplus Estate Settlement

This is one of the rare cases when this asset will generate sufficient funds that all claims and administrative expenses will be paid in full. The "settlement" or compromise is with respect the Debtor's surplus interest in this asset. The claim being settled is part of a larger, nationwide settlement concerning the use of a prescription drug.

At the hearing the court reviewed the proposed settlement and directed that a copy of the settlement to be filed with the court under seal. Based on the court's review, the proposed settlement is presented in good faith and the best interests of the Debtor and the estate.

The court has also been presented with the declaration of Mitchell Allen. Mr. Allen is the special counsel for the Chapter 7 Trustee in connection with the litigation from which the settlement emanates. Before representing the Trustee Mr. Allen was counsel for the Debtor in the litigation. Though employed as special counsel, since this is a surplus estate and both the Trustee and special counsel owe a fiduciary duty to the estate, counsel's recommendation of the settlement works to provide a resolution which is in the best interests of the Debtor as well as the estate.

Interestingly, there is only one proof of claim filed in this case, which is by Jefferson Capital Systems, LLC in the amount of \$365.00. Amended Schedule F lists general unsecured claims of only \$3,230.94. Dckt.

19. The Master Mailing List filed by the Debtor lists only three creditors. Dckt. 3. This is the List used by the Bankruptcy Noticing Center for sending out the Notice of Bankruptcy Filing in this case. Certificate of Notice, Dckt. 9.

The Notice to File Proofs of Claim was served on May 3, 2013. Certificate of Service, Dckt. 46. The deadline for filing proofs of claim was August 1, 2013. Notice, Dckt. 43.

At the hearing the Debtor represented to the court -----
-----.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate. The motion is granted.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Compromise filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compromise Controversy against Defendant Pfizer, Inc. filed by the Chapter 7 Trustee is granted and the respective rights and interests of the parties are settled on the Terms set forth in the executed Settlement Agreement filed under seal with the court, Dckt. XXXX.

8. [10-91946-E-7](#) STEFANIE TEODORIU
SLF-4 Pro Se

MOTION FOR COMPENSATION FOR
MITCHELL GILBERT ALLEN, SPECIAL
COUNSEL(S), FEES: \$6,792.54,
EXPENSES: \$0.00
8-5-13 [[58](#)]

DISCHARGED 9-7-10

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*) Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 5, 2013. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered.

The Final Application for Fees is granted. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

FEES REQUESTED

Mitchell Gilbert Allen, Esq of Cory, Watson, Crowder & DeGaris, PC, Special Litigation Counsel for the Chapter 7 Trustee, makes a Final Request for the Allowance of Fees and Expenses in this case. The order of the court approving employment of counsel was entered on May 3, 2013.

Counsel was obtained to litigate Debtor's products liability lawsuit filed June 9, 2011, that was subsequently made part of multi-district litigation entitled *In re: Chantix (Varenicline) Products Liability Litigation (MLD-2092)*, *Stefanie Marie Bush v. Pfizer, Inc.*; United States District Court, Northern District of Alabama, Southern Division, Case No. 2:09-CV-2039-IPJ ("Lawsuit").

The Trustee requests that the court authorize payment to Mr. Allen of attorneys' fees of 40% of the gross recovery and \$6,792.54 in costs.

Trustee does not provide specific amounts of attorneys fees because, as explained in the accompanying motion to compromise, the defendant in the Lawsuit has required that the terms of the settlement in the underlying lawsuit be confidential and the Trustee is not authorized to disclose the amount of special counsel's fee. The Trustee is prepared to disclose to the court in confidence the fees requested, the settlement amount, the settlement documents and any other information the court feels necessary and appropriate.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

- (a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?
- (b) To what extent will the estate suffer if the services are not rendered?
- (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that Counsel's services rendered a successful negotiation of a settlement of the Lawsuit for the benefit of the Estate. The settlement is sufficient to pay all unsecured creditors and administrative expenses in full (including all professional fees), such that there will be a surplus paid over to the Debtor. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The court finds that rates are reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$xxxx are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$6,792.54. For the expenses, the court questions \$33.74 for "Legal Research (LEXIS/NEXIS and PACER)." Counsel is expected as part of its hourly rate to have the necessary and proper legal resources available to provide the representation. Counsel did not provide any information to the court that these were extraordinary expenses than one would expect for counsel representing a trustee or debtor in possession in this court. Absent an explanation in future cases, counsel representing parties in a bankruptcy case can anticipate such add on charges to be summarily denied as expenses which the court expects to be included as part of the standard services justifying the hourly billing rates. The total costs in the amount of \$6,758.80 are approved and authorized to be paid by

the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel is allowed, and the Trustee is authorized to pay, the following amounts as compensation as a professional in this case:

Attorneys' Fees	\$x,xxxx.00
Costs and Expenses	\$ 6,758.80

For a total final allowance of \$xxxx in Attorneys' Fees and Costs in this case.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Cory, Watson, Crowder & DeGaris, PC is allowed the following fees and expenses as a professional of the Estate:

Cory, Watson, Crowder & DeGaris, PC, Counsel for the Estate Applicant's Fees Allowed in the amount of \$ xxxx
Applicants Expenses Allowed in the amount of \$6,758.80,

IT IS FURTHER ORDERED that the Application is denied as to \$33.74 in expenses.

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

The Court shall also issue an order sealing the record and for destruction of the non-redacted documents three years after the approval of the Settlement.

ORDER SEALING RECORD

Upon review of the Settlement Agreement from the litigation for which Cory, Watson, Crowder & DeGaris, PC were special counsel for the Trustee in this case, the confidentiality terms of that agreement, that the award of legal fees is based on a known percentage of the settlement amount, and good cause appearing;

IT IS ORDERED that the Clerk of the Court shall seal the following documents filed with the bankruptcy court, with such documents not made available to public review or disclosure except upon order of this court for cause shown, for a necessary purpose, and as permitted by applicable non-bankruptcy law:

- A. The non-redacted Settlement Agreement filed as an exhibit to the Chapter 7 Trustee's Motion to Approve Compromise, DCN: SLF-3. The non-redacted Settlement Agreement is filed as docket entry number **xxxxxx**.
- B. The non-redacted Civil Minutes from the September 5, 2013 hearing on the Chapter 7 Trustee's Motion to Approve Compromise, DCN: SLF-3. The non-redacted Civil Minutes is filed as docket entry number **xxxx**.
- C. The non-redacted Order approving the Settlement Agreement (DCN: SLF-3). The non-Redacted Order is filed as docket entry number **xxxxxx**.
- D. The non-redacted Civil Minutes from the hearing on the Motion of Cory, Watson, Crowder, & DeGaris, PC for the allowance of fees and expenses, DCN: SLF-4. The non-redacted Civil Minutes is filed as docket entry number **xxxx**.
- E. The non-redacted Order of the court approving attorneys' fees and costs to Cory, Watson, Crowder & DeGaris, PC, as special counsel for the Chapter 7 Trustee, DCN: SLF-4. The non-redacted Order is filed as docket entry number **xxxx**.

IT IS FURTHER ORDERED that any motion to unseal or provide access to any person other than the judge of this court shall be granted only after noticed motion on at least 28-days notice. Copies of the Motion and all supporting pleadings shall be served on any parties having an interest in the Settlement Agreement, including:

- A. Cory, Watson, Crowder & DeGaris, PC, Attn: Mitchell Gilbert Allen Esq., at **xxxxxx**, or the then current address listed for that law firm with the Georgia State Bar Association;
- B. Gary Farrar, the Chapter 7 Trustee, at the then current address listed for him by the Clerk of the Bankruptcy Court for the Eastern District of California;

- C. The Office of the United States Trustee having authority for the Region or other geographic area which includes this court;
- D. The Suntag Law Firm, attn: Dana Suntag, 20 North Sutter Street, Fourth Floor, Stockton, California 95202, or the then current address for that law firm with the California State Bar.
- E. **XXXXXX**, counsel for Pfizer, Inc. in the litigation for which the settlement has been entered into by the parties, as **XXXX**, or the then current address for said law firm by the **XXXX** State Bar.

IT IS FURTHER ORDERED that except as amended by subsequent order of the court, as soon as business practical after September 1, 2016, the Clerk of the United States Bankruptcy Court shall delete from the court's records and destroy the following documents (1) the non-redacted copy of the Settlement Agreement between Pfizer, Inc. and the Chapter 7 Trustee, the Civil Minutes from the September 5, 2013 hearing on the Motion to Approve the Settlement Agreement, and the non-redacted Order Approving the Settlement Agreement (DCN: SLF-3), and (2) the non-redacted Civil Minutes from the September 5, 2013 hearing on the Motion to Approve Legal Fees of Cory, Watson, Crowder & DeGaris, PC, as special counsel for the Chapter 7 Trustee and the non-redacted Order Approving the Legal Fees of Cory, Watson, Crowder & DeGaris, PC, as special counsel for the Chapter 7 Trustee (DCN: SLF-4). The docket entries for each of these documents are specified above in this Order. The redacted copies of each of the documents shall be retained in the court's records.

Upon deleting and destroying the documents at the above identified docket entries, the Clerk of the Court shall replace them the following notice:

NOTICE

A Non-Redacted Copy of the [describe document] may be available (subject to confidentiality provisions of the Settlement Agreement and applicable non-bankruptcy law, from the Special Counsel for the Chapter 7 Trustee or Counsel for Pfizer, Inc. The non-redacted copy of this Document was deleted from the court's file three years after the approval of the Settlement.

9. [13-90857](#)-E-7 RYAN/MONSERRAT JACKSON
MLP-1 Martha Passalacqua

MOTION TO AVOID LIEN OF FIA
CARD SERVICES, N.A.
8-16-13 [[23](#)]

DISCHARGED 8-12-13

Local Rule 9014-1(f) (2).

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, respondent creditors, and Office of the United States Trustee on August 15, 2013. By the court's calculation, 21 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion to Avoid a Judicial Lien has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) (2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Avoid a Judicial Lien. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

A judgment was entered against the Debtor in favor of FIA Card Services, N.A. for the sum of \$24,674.48. The abstract of judgment was recorded with Stanislaus County on September 24, 2012. That lien attached to the Debtor's residential real property commonly known as 3001 Mars Hill Street, Modesto, California.

The motion is granted pursuant to 11 U.S.C. § 522(f) (1) (A). Pursuant to the Debtor's Schedule A, the subject real property has an approximate value of \$236,962.00 as of the date of the petition. The unavoidable consensual liens total \$288,255.07 on that same date according to Debtor's Schedule D. The Debtor claimed an exemption pursuant to Cal. Civ. Proc. Code § 703.140(b) (1) in the amount of \$1.00 in Schedule C. The respondent holds a judicial lien created by the recordation of an abstract of judgment in the chain of title of the subject real property. After application of the arithmetical formula required by 11 U.S.C. § 522(f) (2) (A), there is no equity to support the judicial lien. Therefore,

the fixing of this judicial lien impairs the Debtor's exemption of the real property and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the judgment lien of FIA Card Services, N.A., Stanislaus County Superior Court Case No. 676310, Document No. 2012-0084700-00, recorded on September 24, 2012, with the Stanislaus County Recorder, against the real property commonly known as 3001 Mars Hill Street, Modesto, California, is avoided pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

10. [11-94073](#)-E-7 JOAO/MARIA CORREIA
SLF-4 Thomas O. Gillis

MOTION FOR COMPENSATION BY THE
LAW OFFICE OF SUNTAG FOR DANA
A. SUNTAG, TRUSTEE'S
ATTORNEY(S), FEES: \$1,500.00,
EXPENSES: \$0.00
8-8-13 [[240](#)]

DISCHARGED 1-22-13

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 8, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Final Application for Fees is granted. No appearance required.

FEES REQUESTED

The Suntag Law Firm, Counsel for the Chapter 7 Trustee, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period January 10, 2013 through September 5, 2013. The order of the court approving employment of counsel was entered on March 6, 2013.

Description of Services for Which Fees Are Requested

General Case Administration: Counsel spent 7.0 hours in this category. Counsel prepared employment application, reviewed Debtor's schedules to determine whether it was appropriate to file a complaint objecting to discharge, and prepared the instant application.

Sale to Debtor of Estate's Nonexempt Interest in Vehicles: Counsel spent 4.4 hours in this category. Counsel reviewed the sale agreement, prepared and filed a motion to sell, and appeared at the hearing.

Review of Motion for Relief and Motion to Abandon: Counsel spent 4.9 hours in this category. Counsel investigated the values of the properties and assisted the Trustee in determining that each was burdensome to the estate; prepared a motion to abandon and appeared at the hearing..

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate;

(II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v.*

Puget Sound Plywood, Inc. (In re Puget Sound Plywood), 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

(a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that Counsel's services rendered a successful sale of nonexempt interest for the benefit of the Estate. The estate has \$6,500.00 to be administered as of the filing of the application. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$315.00/hour for counsel Dana Suttgart for 3.2 hours, \$295.00/hour for counsel Loris Bakken for 8.3 hours, and \$225.00/hour for counsel Ricardo Aranda for 3.3 hours. Counsel seeks a reduction from their actual fees of \$4,334.00. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$113.24 for copies and postage. The total costs in the amount of \$113.24 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

The total attorneys' fees and costs in the amount of \$1,500 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel is allowed, and the Trustee is authorized to pay, the following amounts as compensation as a professional in this case:

Attorneys' Fees and Costs	\$1,500.00
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The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that The Suntag Law Firm is allowed the following fees and expenses as a professional of the Estate:

The Suntag Law Firm, Counsel for the Estate
Applicant's Fees and Costs Allowed in the amount of
\$,1500.00

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

11.	<u>13-91379-E-7</u>	DANNY/TANYA SHAW	MOTION TO COMPEL ABANDONMENT
	SDM-1	Scott D. Mitchell	7-31-13 [<u>9</u>]

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on July 31, 2013. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered.

The Motion to Abandon Real Property is granted and the Trustee is ordered to abandon the property. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling

becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtors seek an order compelling abandonment of the estates interest in the Debtors' business, Danny L. Shaw Heating & Air Conditioning, located at 1320 Angie Avenue, Modesto, California.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

Here, the business property consists of a 2006 ford E150, 2008 Box Trailer, Flat Bed Trailer, computer, printer, file cabinet, two chars, two desks and phones, along with hand tools, screw drivers, and pliers. The Debtors have placed a value of \$6,625 on the business assets. Debtors state that no creditors hold any liens against the business assets, but they have claimed exemptions in the business assets totaling \$6,625.00.

The Trustee filed a non-opposition on August 5, 2013.

Since the debtors have fully exempted the business property and the negative financial consequences of the Estate retaining the property, the court determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Abandon Property filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted and that the personal identified as:

1. Business Name: Danny L. Shaw Heating & Air Conditioning
2. Business Assets:
 - a. 2006 ford E150,
 - b. 2008 Box Trailer,
 - c. Flat Bed Trailer,
 - d. computer,
 - e. printer,
 - f. file cabinet,
 - g. two chars,
 - h. two desks and phones,

September 5, 2013 at 10:30 a.m.

- i. hand tools, screw drivers, and pliers

on Schedule B by the Debtors are abandoned to the Debtors Danny and Tanya Shaw, by this order, with no further act of the Trustee required.

12. [11-94184-E-7](#) FRANK/VIRGINIA DELISE MOTION FOR COMPENSATION BY THE
SLF-2 Shane Reich LAW OFFICE OF SUNTAG LAW FIRM
FOR DANA A. SUNTAG, TRUSTEE'S
ATTORNEY(S), FEES: \$3,825.00,
EXPENSES: \$29.36
8-8-13 [[32](#)]

DISCHARGED 3-19-12

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on August 8, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Final Ruling: The Final Application for Fees has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Final Application for Fees is granted. No appearance required.

FEES REQUESTED

The Suntag Law Firm, Counsel for the Chapter 7 Trustee, makes a Final Request for the Allowance of Fees and Expenses in this case. The period for which the fees are requested is for the period April 12, 2013 through September 5, 2013. The order of the court approving employment of counsel was entered on May 7, 2013.

Description of Services for Which Fees Are Requested

Case Administration: Counsel spent 7.9 hours in this category. Counsel prepared employment application, reviewed Debtor's schedules to determine whether it was appropriate to file a complaint objecting to Debtors' discharge and prepared the instant application.

Motion to Reopen: Counsel spent 1.8 hours in this category. Counsel prepared the motion to reopen this case, which it submitted to the US Trustee for service and filing.

Recovery of Property of the Estate: Counsel spent 4.6 hours in this category. Counsel prepared and sent a letter to Debtor's counsel demanding that the Debtors turn over to the Trustee the \$30,000.00 they received as a partial settlement in their lawsuit. Debtors turned over \$23,325 to the Trustee and explained that some of the money was spent on funeral expenses. Counsel reviewed the filed claims and the Schedule F and determined the amount sufficient to pay off all unsecured creditors and administrative expenses in full.

DISCUSSION

Pursuant to 11 U.S.C. § 330(a)(3),

In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including-

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;

(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and

(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Further, the court shall not allow compensation for,

(i) unnecessary duplication of services; or

- (ii) services that were not--
 - (I) reasonably likely to benefit the debtor's estate;
 - (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

Benefit to the Estate

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged as legal services, the attorney must still demonstrate that the work performed was necessary and reasonable. *Unsecured Creditors' Committee v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 958 (9th Cir. 1991). An attorney must exercise good billing judgment with regard to the legal services undertaken as the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign [sic] to run up a [legal fee] tab without considering the maximum probable [as opposed to possible] recovery." *Id.* at 958. According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney is obligated to consider:

- (a) Is the burden of the probable cost of legal services disproportionately large in relation to the size of the estate and maximum probable recovery?
- (b) To what extent will the estate suffer if the services are not rendered?
- (c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

Id. at 959.

A review of the application shows that Counsel's services rendered a successful turn over of the settlement proceeds from the lawsuit for the benefit of the Estate. The estate has \$29,325.00 to be administered as of the filing of the application. The court finds the services were beneficial to the estate and reasonable.

FEES ALLOWED

The hourly rates for the fees billed in this case are \$315.00/hour for counsel Dana Suttgart for 2.0 hours, \$295.00/hour for counsel Loris Bakken for 9.0 hours, and \$225.00/hour for counsel Ricardo Aranda for 1.8 hours. The court finds that the hourly rates reasonable and that counsel effectively used appropriate counsel and rates for the services provided. The total attorneys' fees in the amount of \$3,825.00 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel for the Trustee also seeks the allowance and recovery of costs and expenses in the amount of \$29.36 for copies and postage. The total costs in the amount of \$29.36 are approved and authorized to be paid by the Trustee from the available funds of the Estate in a manner consistent with the order of distribution in a Chapter 7 case.

Counsel is allowed, and the Trustee is authorized to pay, the following amounts as compensation as a professional in this case:

Attorneys' Fees	\$ 3,825.00
Costs and Expenses	\$ 29.36

For a total final allowance of \$3,854.36 in Attorneys' Fees and Costs in this case.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Allowance of Fees and Expenses filed by Counsel having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that The Suntag Law Firm is allowed the following fees and expenses as a professional of the Estate:

The Suntag Law Firm, Counsel for the Estate
Applicant's Fees Allowed in the amount of \$ 3,825.00
Applicants Expenses Allowed in the amount of \$29.36,

IT IS FURTHER ORDERED that this is a final award of fees pursuant to 11 U.S.C. § 330, and the Trustee is authorized to pay such fees from funds of the Estate as they are available.

13. [13-91489-E-7](#) **MICHAEL MARTIN AND KAREN** **MOTION TO ABANDON**
SSA-1 **CASALE-MARTIN** **8-22-13 [9]**
 Steven S. Altman

Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Chapter 7 Trustee, all creditors, and Office of the United States Trustee on August 22, 2013. By the court's calculation, 14 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Abandon Real Property has been set for hearing on the notice required by Federal Rule of Bankruptcy Procedure 6007(b) and Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to grant the Motion to Abandon Real Property. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtors seek an order compelling the Trustee to abandon the real property commonly known as 12948 Welch Street, Waterford, California.

After notice and hearing, the court may order the Trustee to abandon property of the Estate that is burdensome to the Estate or of inconsequential value and benefit to the Estate. 11 U.S.C. § 554(b). Property in which the Estate has no equity is of inconsequential value and benefit. *Cf. Vu v. Kendall (In re Vu)*, 245 B.R. 644 (B.A.P. 9th Cir. 2000).

Here the real property is impaired by a deed of trust in favor of Wells Fargo Home Mortgage securing a loan with a balance of \$20,646.48. Debtor values the property at \$89,308.00. Debtor also claimed a Homestead exemption in the real property subject to California Code of Civil Procedure § 704.730 in the amount of \$100,000.00.

Since the debt secured by the property and the homestead exemption claimed by the Debtor exceeds the value of the property, and the negative financial consequences of the Estate retaining the property, the court

determines that the property is of inconsequential value and benefit to the Estate, and orders the Trustee to abandon the property.

ISSUANCE OF A COURT DRAFTED ORDER

An order (not a minute order) substantially in the following form shall be prepared and issued by the court:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Abandon Property filed by the Debtors having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Compel Abandonment is granted and that the real property identified as:

12948 Welch Street, Waterford, California

on Schedule A by the Debtors is abandoned to Debtors Michael Martin and Karen Lee Casale-Martin, by this order, with no further act of the Trustee required.

14. [13-90795](#)-E-7 JOSE IRAHETA AND ALBA MOTION TO EXTEND DEADLINE TO
MDM-1 MARTINEZ FILE A COMPLAINT OBJECTING TO
Thomas O. Gillis DISCHARGE OF THE DEBTOR
7-29-13 [[13](#)]

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors's Attorney, and Office of the United States Trustee on July 29, 2013. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion to Extend the Time to File an Objection to Discharge was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Extend the Time to File an Objection to Discharge is granted.
No appearance required.

The Chapter 7 Trustee seeks an extension of time to object to the entry of Debtor's discharge.

The court may, on motion and after a hearing on notice, extend the time for objecting to the entry of discharge for cause. Fed. R. Bankr. P. 4004(b). The Chapter 7 Trustee explains that he is currently investigating the assets and liabilities of the Debtor and Debtor's pre-petition use of assets of the Estate. Trustee states that debtor has failed to fulfill her duty to cooperate with the trustee. Trustee has discovered undisclosed assets and requested turnover of these assets, but Debtor has failed to comply.

The court finds the Trustee's need to perform further investigation of the Debtor's assets, liabilities, and pre-petition use of Estate property to be sufficient cause. Therefore, the motion is granted and the deadline for the Chapter 7 Trustee to object to Debtor's discharge is extended to October 4, 2013.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Extend the Time to File an Objection to Discharge filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is granted and the deadline for the Chapter 7 Trustee or the U.S. Trustee to object to Debtor's discharge is extended to October 4, 2013.

15. [09-92998](#)-E-7 LEON H. BARTLETT, INC. MOTION TO EMPLOY LAMB AND
SSA-51 Steven S. Altman MICHAEL, APC AS SPECIAL COUNSEL
7-25-13 [[994](#)]

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on July 25, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Employ has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered.

The Motion to Employ is granted. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Debtor Leon Bartlett seeks to approval to employ Lamb & Michael, APC ("Applicant") *nunc pro tunc*, who provided accounts receivables collection services to Debtor prior to the filing of this Chapter 11 bankruptcy. Debtor states Applicant was retained and filed a legal action to collect an outstanding account against one of Debtor's customers, Triple J Farms. The action was filed in Merced County Superior Court, No. CV000305 on a contingent fee basis. A judgment was obtained on October 13, 2009 in

Debtor's favor in the sum of \$39,736.19, and Applicant pursued the recovery of the judgment debtor on behalf of the debtor in the sum of \$20,064.23. Debtor states pursuant to the contingent fee agreement, Applicant received a total sum of \$4,012.85.

Debtor, while serving as the Debtor in Possession did not seek approval to appoint Applicant as special counsel to continue the litigation and collection of the judgment debt after filing this petition. The bankruptcy case was converted to one under Chapter 7 by order filed on March 20, 2013. Dckt. 943.

The Chapter 7 Trustee requested that Applicant or Debtor seek retrospective appointment and approval from this court to validate its services and entitlement to receive the fees. Debtor states that the payments of \$4,366.01 were turned over to the Chapter 7 Trustee on February 19, 2013 and no sums were withheld or paid to Applicant.

Debtor argues that Applicant has performed valuable services to the bankruptcy estate which were in the Debtor's ordinary course of business and resulted in benefits to the Debtor's estate during the Chapter 11 reorganization proceeding as well as in the current Chapter 7 proceeding.

The Trustee filed a joinder on July 29, 2013, for the application for appointment of special counsel and approval of contingent collection fee agreement *nunc pro tunc*. Dckt. 1001.

DISCUSSION

Pursuant to § 327(a) a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate, and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Standing to Bring Motion

This Motion was filed by the Debtor, not either the Chapter 7 Trustee (who is employing counsel) or the counsel who states that he has been employed. Before this court can adjudicate rights, the party seeking relief must show the right to the relief requested. The federal courts are not a forum for the theoretical or one in which parties who do not have rights attempt to litigate on behalf of others who are not before the court (with limited exceptions to this rule, such as class action and

other special representative proceedings authorized by Congress). Standing must be determined to exist before the court can proceed with the case. *Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771. (9th Cir. 2006)

Here, the Debtor shows no basis for attempting to adjudicate the rights of the Trustee or counsel. Standing alone, it is merely an "officious intermeddler" who is attempting to obtain an order for a third-party which that third-party can then enforce against the Trustee and estate.

The Chapter 7 Trustee has filed a "Joinder" on July 29, 2013. Dckt. 1001. In it he states,

"Chapter 7 Trustee Eric J. Nims respectfully joins in the Debtor's application for appointment of special counsel and approval fo contingent collection free agreement, *nunc pro tunc*."

However, the Federal Rules of Civil Procedure do not allow a person to unilaterally "join" a contested matter or adversary proceeding. Permissive Joinder, see Fed. R. Civ. P. 20; Fed. R. Bankr. P. 7020, 9014. To "force" oneself into a complaint or motion the court must grant a person the right to intervene in that proceeding. Fed. R. Civ. P. 24; Fed. R. Bankr. P. 7024; with this Rule not being incorporated into Contested Matters pursuant to Fed. R. Bankr. P. 9014 unless ordered by the court. The Debtor, the Movant, has not requested the joinder of the Trustee to the Motion.

The court interprets the "Joinder" to be a request for the Chapter 7 Trustee to intervene in the motion and have it presented to the court so that he may engage, *nunc pro tunc*, the services of counsel. The court accepts, and realigns the parties, with the Chapter 7 Trustee jointly requesting the relief in the Motion with the Debtor, who was the former Debtor in Possession.

A bankruptcy court has discretion in exceptional circumstances to award professional fees that were not authorized in advance, provided that the professional satisfactorily explains the failure to obtain approval in advance and demonstrates that the services provided a significant benefit to the estate. *Law Offices of Ivan W. Halperin v. Occidental Fin. Group, Inc.* (*In re Occidental Fin. Group, Inc.*), 40 F.3d 1059, 1062 (9th Cir. 1994); *THC Fin. Corp.*, 837 F.2d 389, 392 (9th Cir. 1988); *Mehdipour v. Marcus & Millichap* (*In re Mehdi pour*), 202 B.R. 474, 479-80 (9th Cir. BAP 1996); *In re B.E.S. Concrete Prods., Inc.*, 93 B.R. 228, 231 (Bankr. E.D. Cal. 1988).

Applicant provides testimony that they were not made aware of Debtors bankruptcy case until they were contacted by the newly appointed Chapter 7 Trustee. Applicant also states there were other circumstances, such as the passing of the managing partner who was in contact with the Debtor over the account. As soon as the bankruptcy filing was discovered by Applicant, they turned over the funds and sought direction to employ counsel. The court finds sufficient exceptional circumstances to approve of special counsel.

Taking into account all of the relevant factors in connection with the employment and compensation of counsel, considering the declaration demonstrating that counsel does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Lamb & Michael, APC *nunc pro tunc* as special counsel on the terms and conditions set forth in the Single Case Fee Schedule and Scope of Services stating a 20% of the net recovery, filed as Exhibit A, Dckt. 998.

The approval of the contingency fee is subject to the provisions of 11 U.S.C. § 328. The court finds that the 25% contingent fee is reasonable, and allows total contingent fees of \$4,012.58 to counsel.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Employ filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Employ is granted and the Debtor is authorized to employ Lamb & Michael, APC *nunc pro tunc* as special counsel on the terms and conditions as set forth in the Agreement filed as Exhibit A, Dckt. 998.

IT IS FURTHER ORDERED that the court approves the contingent fee of 25% and allows Counsel attorneys' fees of \$4,012.85, which may be paid from the monies collected by counsel for the debt which is the subject of the contingent fee agreement. This is a final award of fees pursuant to 11 U.S.C. § 330.